No.

IN THE
Supreme Court of the United States

JOSEPH RODI,

Petitioner,

V.

SOUTHERN NEW ENGLAND SCHOOL OF LAW, et al.,

Respondent.

On the Petiton for Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Joseph Rodi
-Pro se
675 Woodland Avenue
Cherry Hill, NJ 08002
856-662-6177

October 14, 2008

PARTIES TO THE PROCEEDING

The following individuals and entities are parties in the Court below:

Francis J. Larkin, David M. Prentiss and the Southern New England School of Law.

OPINION BELOW

The order of the United States Court of Appeals for the First Circuit affirming the opinion of the Court below is not reported.

Jurisdiction

The First Circuit rendered its decision on June 30, 2008 reported at 532 F.3d 11 and denied rehearing and rehearing en banc on July 18, 2008. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254 (1)

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INTRODUCTION

In a case that has drawn the attention – and triggered the deep concern – of students, administrators and the legal community nationwide, the First Circuit has profoundly upset settled understandings of the role of the jury in our legal system.

Students are now faced with an alarming message. They are responsible for discovering the truth behind statements made by administrators who posses intimate knowledge about the very issue they speak. The decision below, contrary to settled law, placed no responsibility on law school deans' statements about ABA accreditation, but rather permits a law school dean to escape responsibility as a flawed prognosticator. This is wildly wrong. A dangerous precedent has been made and this Court should say so.

This Court has not had the occasion to provide guidance to students with respect to a students constitutional rights and the solemn duty of school administrators. This Courts authoritative guidance is badly needed.

STATEMENT OF THE CASE

In July of 1997, Joseph Rodi, resided in New Jersey, received a recruitment letter from Francis J. Larkin, dean of Southern New England School of Law [SNESL]. The letter stated that the accreditation committee of the American Bar Association (ABA) had voted to recommend SNESL for "provisional accreditation," a status that would be granted upon ratification of the recommendation by two other ABA bodies. The letter also stated that SNESL was "highly confident" of receiving the needed ratifications and that the future of the school "has never been brighter." Because the plaintiff intended to take the New Jersey bar examination, the prospect of accreditation was critically important to him because New Jersey requires bar applicants to hold law degrees from ABA-accredited institutions.

Despite the cheery optimism of Larkin's letter, the dean knew full well that SNESL had identifiable deficiencies that would almost certainly preclude ABA accreditation. Indeed, the Court below found that the dean privately had his own reasons for concern.

The ABA denied SNESL's application for accreditation in September of 1997. As a result, the plaintiff considered transferring to an accredited law school for his second year of study. Word of his ambivalence reached the dean's office. David M. Prentiss, who was then the acting dean, wrote to the plaintiff in order to "make sure" that he was "fully informed of the school's current status regarding ABA accreditation." Dean Prentiss wrote in substance that the school had improved the four areas found deficient by the ABA and that there should be "no cause for pessimism" about the school achieving accreditation before the plaintiff's graduation date. SNESL failed to meet the minimum requirements for ABA accreditation or proffer a reasonable plan to become compliant within three (3) years. To date, SNESL remains unaccredited.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. First, the Court below ruled that no reasonable jury could conclude the Rodi acted reasonably in relying on his deans promises of accreditation because he

sought a transfer to the two New Jersey law schools, Seton Hall and Rutgers. Rodi did state quite clearly, however, that he would not have transferred to another law school because he believed in the statements of his deans.

The Court below held as a matter of law that a jury could not have found Rodi to have believed in his deans statements, and thereby, usurp the role of the jury.

Second, the ABA is the only agency recognized by Department of Education as a law school accrediting agency. As part of its accreditation process, the ABA has a set of Standards for the Approval of Law Schools ("Standards"), setting forth the minimum requirements for legal education that must be met to obtain and maintain ABA approval. These Standards are supplemented by formal Interpretations and Rules. The Standards and their Interpretations cover many aspects of the operation of a law school, including its salary structure, student-faculty ratios, faculty leave policies, faculty workloads, and physical facilities. The Rules are primarily procedural, and follow the framework of 20 U.S.C. § 1099 b(a)(5). In every instance, the rules are known to the applicant

law school. The law school bears the responsibility to meet the minimum requirements of the ABA Standards. This framework was disregarded by the Court below.

Third, and of equal importance, District Judge Nancy Gertner dismissed Rodi's case for failing to state a viable claim. Rodi appealed, arguing among other things that Her Honor ought to have disqualified herself from the case, because she had received an honorary degree from the law school and appeared to bolster the law school's reputation. The appellate court disagreed, holding that Judge Gertner properly exercised her judicial discretion. Interestingly, the appellate court believed the time saved in adjudicating Rodi's case, due to Gertner's familiarity with the subject matter outweighed any appearance of impropriety. This Court now has the opportunity confront the issue of impropriety within the public eye.

United States Court of Appeals
For the First Circuit

No.07-1770
JOSEPH RODI
Plaintiff – Appellant
v.
SOUTHERN NEW ENGLAND SCHOOL OF LAW; FRANCIS J.LARKIN, ESQUIRE; DAVID M. PRENTISS, ESQUIRE
Defendants –Appellees

Before
Lynch, Chief Judge
,Torruella, Boudin,
Lipez and Howard,
Circuit Judges.

ORDER OF COURT
Entered: July 18, 2008
The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:
/s/ Richard Cushing Donovan, Clerk
[cc: Elizabeth Houlding, Allen David, Jonathan Plaut]

United States Court of Appeals
For the First Circuit

No. 07-1770

JOSEPH RODI,

Plaintiff, Appellant,

v.

SOUTHERN NEW ENGLAND SCHOOL OF LAW; FRANCIS J. LARKIN; DAVID M. PRENTISS,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nancy Gertner, U.S. District Judge]

Before

Torruella, Lipez, and Howard,
Circuit Judges.

Jonathan D. Plaut, with whom Chardon Law Offices was on brief, for appellant.

Elizabeth A. Houdling, with whom Allen N. David, and Peabody & Arnold LLP were on brief, for appellees.

June 30, 2008

HOWARD, Circuit Judge. Joseph Rodi graduated from Southern New England School of Law ("SNESL") in 2000. Because the school failed to achieve American Bar Association ("ABA") accreditation prior to Rodi's graduation, he is unable to sit for the New Jersey bar examination. As a result, Rodi sued SNESL, alleging that the deans of the school made false statements to him regarding the school's accreditation prospects that induced him to remain at SNESL and forgo other opportunities. He claimed fraud and a violation of a consumer protection statute. The district court granted

summary judgment for SNESL after concluding that no reasonable jury could find his claims meritorious. We affirm.

I. Background

We state the facts necessary to set the context for the case here but include more where needed. We present these facts in the light most favorable to Rodi. See Hadfield v. McDonough, 407 F.3d 11, 14 (1st Cir. 2005).

In March of 1997, Joseph Rodi applied to Southern New England School of Law -- a law school unaccredited by the ABA. Soon after Rodi applied, the ABA's Accreditation Committee recommended SNESL for "provisional accreditation," which would allow graduates of the school to sit for the bar examination in all fifty states.[1] Dean Francis Larkin, then acting dean of SNESL, sent prospective

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[1] Although graduates of provisionally accredited law schools are entitled to the same recognition given to graduates of fully approved law schools, a law school must be provisionally approved for at least two years before receiving full ABA accreditation.

students, including Rodi, a letter detailing this development. Although Larkin noted that the Committee's recommendation had to be ratified by two more ABA entities, he wrote, "We are highly confident of gaining these favorable approvals at the ABA Annual Meeting in August." Rodi -- who intended to eventually sit for the New Jersey bar examination[2] -- enrolled at SNESL. At all relevant times, the law school catalogue contained a disclaimer that provided: "The Law School makes no representation to any applicant or student that it will be approved by the American Bar Association prior to the graduation of any matriculating student."

Despite Larkin's optimism, in August the ABA denied SNESL provisional accreditation. It notified SNESL that the school was not in substantial compliance with a number of ABA accreditation standards and expressed concern about

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[2] New Jersey requires bar applicants to hold degrees from ABA accredited law schools.

the school's compliance with other accreditation standards.

Around a month later, in September of 1997, Dean Larkin hosted a student meeting at SNESL; Rodi attended. At this meeting, Larkin said SNESL would reapply for provisional accreditation at its next opportunity and assured the students that the school had rectified deficiencies in its application. Larkin also promised that the ABA would grant SNESL accreditation, stating "The school will be accredited by the ABA the next time around and before you graduate."

In the summer of 1998, following his first year at SNESL, Rodi sent transfer applications to Rutgers and Seton Hall law schools. Dean David Prentiss, who had replaced Dean Larkin as acting dean, received notice of Rodi's interest in transferring. He wrote Rodi a letter asking him to consider carefully whether a transfer was in his best interest. In this letter, Prentiss cited the progress SNESL had made toward achieving ABA

accreditation and noted, "[T]here should be no cause for pessimism about the school's ultimate achievement of ABA approval." Although Rodi received Prentiss's letter, he chose not to withdraw his transfer applications. Both law schools ultimately denied him admission.

During discovery it was revealed that when both Dean Larkin and Dean Prentiss made these statements they had concerns regarding SNESL's prospects for accreditation. Dean Larkin said that in August of 1997, after the ABA denied SNESL provisional accreditation, he was not highly confident that SNESL's renewed application would be successful. Similarly, Dean Prentiss said that he did not know how the ABA would rule on the renewed application and that he recognized SNESL was at the low end of the spectrum with regards to the resources necessary to garner accreditation.

In November of 1999 -- during Rodi's third year at SNESL -- the ABA's Accreditation Committee rejected SNESL's renewed application for

accreditation and did not recommend that SNESL be granted provisional accreditation. The Committee cited SNESL's failure both to comply with ABA standards and to present a reliable three-year plan for complying with the standards. SNESL did not appeal the Committee's decision. Although Rodi graduated from SNESL in September of 2000, because SNESL failed to receive ABA accreditation prior to his graduation he is unable to sit for the New Jersey bar examination.

In June of 2003, Rodi sued SNESL, Larkin, and Prentiss in the United States District Court for the District of Massachusetts.[3] He claimed that the defendants' statements constituted fraudulent misrepresentation and violated a consumer protection statute, Mass. Gen. Laws ch. 93A, §§ 1-11 ("Chapter 93A"). The district court

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[3] Rodi originally filed suit in July, 2002 in the United States District Court for the District of New Jersey. However, the court dismissed his case for want of in personam jurisdiction leading him to file this action in Massachusetts. See Rodi v. S. New Eng. Sch. of Law, 389 F.3d 5, 11 (1st Cir. 2004) (describing this sequence of events).

granted the defendants' motion to dismiss and ruled, without elaboration, that Rodi failed to state a claim upon which relief could be granted. We reversed the district court in part and remanded the case for further proceedings after concluding that Rodi alleged a colorable fraudulent misrepresentation claim and that he should be allowed to amend his Chapter 93A claim to remedy pleading deficiencies. See Rodi, 389 F.3d at 20-21.

On remand, Rodi filed a motion for reassignment pursuant to Local Rule 40.1(K)(2). In this motion, he claimed that the terms of the remand did not require the original judge to conduct further proceedings and that no substantial savings of time would result if the judge did retain the case. The judge denied his motion, specifically finding that her familiarity with the case would result in a savings of time.

After discovery, the district court granted SNESL's motion for summary judgment on Rodi's fraudulent misrepresentation claim. Although

the court questioned whether the deans made false statements of material fact, it concluded that even if they had made such statements Rodi's reliance was unreasonable as a matter of law. The court similarly dispensed with Rodi's Chapter 93A claim, concluding that Rodi's inability to prove fraudulent misrepresentation sealed the claim's fate. Rodi appeals.

II. Discussion

Rodi presents three arguments on appeal. His first and primary argument is that the district court erred in granting summary judgment to SNESL on his fraudulent misrepresentation claim. Relatedly, he argues that the court erred in granting summary judgment to SNESL on his Chapter 93A claim -- which was also premised on the conduct underlying his fraud claim. Finally, Rodi argues that the district judge should have either recused herself from this case or reassigned it to another judge pursuant to Local Rule 40.1(K)(2). We take up each claim in turn.

A. Fraudulent Misrepresentation

We review grants of summary judgment de novo. Vives v. Fajardo, 472 F.3d 19, 21 (1st Cir. 2007). Because this is a diversity case, Massachusetts law controls. B & T Masonry Constr. Co. v. Pub. Serv. Mut. Ins. Co., 382 F.3d 36, 38 (1st Cir. 2004).

Under Massachusetts law, to recover for fraudulent misrepresentation Rodi must allege and prove that: (i) the defendants made a false representation of a material fact with knowledge of its falsity for the purpose of inducing him to act thereon, (ii) he relied upon the representation as true and acted upon it to his detriment, and (iii) that his reliance was reasonable under the circumstances. Rodi, 389 F.3d at 13; Masingill v. EMC Corp., 870 N.E.2d 81, 88 (2007). Although the reasonableness of a party's reliance is ordinarily a question of fact for the jury, Cataldo Ambul. Serv., Inc. v. City of Chelsea, 688 N.E.2d 959, 962 (1998), if no reasonable jury could find the party's reliance reasonable a court

may grant summary judgment. See Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236, 242 (D. Mass. 1999) (citing Saxon Theatre Corp. v. Sage, 200 N.E.2d 241, 244-45 (1964)).

Rodi focuses his claim of fraudulent misrepresentation on statements made by Dean Larkin and Dean Prentiss during their respective stints as deans of SNESL.[4] His argument is as follows: Statements made by the deans, specifically Larkin's statements in the fall of 1997 and Prentiss's statement in the spring of 1998, misrepresented SNESL's accreditation prospects. The misrepresentations were made knowingly because both deans, when publishing their statements, had

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[4] Although Rodi does identify statements made by other administration and faculty members, he does not specifically argue that these speakers knowingly made false statements for the purpose of inducing him to rely or that he reasonably relied on these statements. Accordingly, we do not examine those statements here. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990)("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

information suggesting that provisional accreditation was unlikely. The deans spoke for the purpose of inducing Rodi to remain at SNESL, fearing an exodus of students would cost the school a substantial amount of money and further undermine the school's chances of achieving accreditation. Because he trusted the deans, whom he assumed had access to information regarding the school's true accreditation status, Rodi relied on their statements and chose to forgo opportunities available to him, such as the pursuit of a Ph.D. As a result of his forbearance, he suffered damages including lost tuition, salary that would have been available to him had he held a job during his years of attendance at SNESL, and potentially the loss of financial benefits associated with holding a Ph.D.

After consulting the summary judgment record, we find his argument unpersuasive and conclude that the district court correctly granted summary judgment to SNESL. We do so because even assuming that Dean Larkin and Dean Prentiss

made false statements of material fact for the purpose of inducing Rodi to remain at SNESL, no reasonable jury could find (1) that Rodi relied on their statements, or (2) that his reliance was reasonable. We address the frailties in Rodi's fraudulent misrepresentation claim in that order.

Rodi claims that he relied on statements made by the deans but this is directly contradicted by his own actions. In the summer of 1998, following Larkin's statements, Rodi sent transfer applications to two law schools: Rutgers and Seton Hall. Despite Prentiss's letter asking him to reconsider his decision to seek a transfer, Rodi chose not withdraw his applications. Rodi's attempts to transfer to an ABA accredited law school strongly suggest that he did not believe the deans' statements regarding SNESL's prospects for ABA approval.

Rodi's failure to offer an explanation for his unyielding pursuit of a transfer is damning. Rodi could have easily offered plausible explanations for both his attempted transfer and his failure to

withdraw his applications that would have been technically compatible with his assertion that he relied on Larkin's and Prentiss's statements.[5] Instead, he says nothing and thus fails to undercut the powerful inference that he never relied on what the deans were saying regarding accreditation in the first place.

Rodi, perhaps realizing the significance of his failure to withdraw the application, attempts to shore up the reliance element of his claim by baldly asserting that he did rely and by adding that, if not for the deans' statements, he would have pursued a Ph.D. His effort falls short. First, his claim that he did rely is merely a conclusory allegation insufficient to defeat summary judgment. See Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Second, his claim that he relied by foregoing the pursuit of a Ph.D is dubious in

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[5] For example, Rodi could have offered evidence that he sought a transfer because he wanted to attend a school closer to his home in New Jersey and that he did not withdraw his applications simply because of the hassle of doing so.

light of his failure to explain away his transfer attempt. Put simply, if the deans' respective statements were not enough to convince Rodi to relinquish his pursuit of a transfer, it seems equally unlikely they would have been enough to persuade Rodi to shelve his pursuit of a Ph.D.

But even if Rodi did rely on Dean Larkin's and Dean Prentiss's statements, his reliance was unreasonable. This becomes evident once we analyze what the deans said.[6]

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[6] Although Rodi contends that Dean Larkin and Dean Prentiss promised him and the SNESL student body on "numerous occasions and in numerous locations that they were certain of achieving ABA accreditation," the only statements pled with particularity are Dean Larkin's statement in September of 1997 and Dean Prentiss's statement in July of 1998. See Rodi, 389 F.3d at 15 (noting that the Federal Rules of Civil Procedure require allegations of fraud be "stated with particularity" and that this requires "an averment 'of the who, what, where, and when of the allegedly false or fraudulent representation'"). Rodi's reference to student affidavits fails to cure this particularity deficiency. These affidavits only reference Dean Larkin's statement in September of 1997 with the requisite detail and otherwise contain only general statements that the deans made various verbal representations to the student body.

Dean Larkin made two statements: first, that SNESL had rectified the deficiencies in its application that the ABA had identified and second, that the ABA would grant SNESL accreditation before the students graduated.[7]

As for Larkin's first statement, it was unreasonable for Rodi to believe that SNESL had remedied accreditation problems significant enough to derail its application in just four weeks. See Yorke v. Taylor, 124 N.E.2d 912, 916 (1955) (noting reliance cannot be deemed reasonable when alleged misrepresentation is "palpably false").

But it was even more unjustified for Rodi to rely on Larkin's second statement promising accreditation before Rodi graduated. First, at all times Rodi was attending SNESL, the law school catalogue contained a disclaimer which provided: "The Law School makes no representation to any

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[7] Dean Larkin also told the students that SNESL would reapply for provisional approval at its next opportunity. Because the school did so we need not analyze the statement further.

applicant or student that it will be approved by the American Bar Association prior to the graduation of any matriculating student." Although disclaimers, under Massachusetts law, do not serve as automatic defenses to allegations of fraud, see Sheehy v. Lipton Industries, Inc., 507 N.E.2d 781, 784 (Mass. App. Ct. 1987), they obviously may be considered when assessing the reasonableness of a party's reliance. The school, through its disclaimer, essentially urged Rodi and other SNESL students to ignore statements such as the one made by Dean Larkin.

Second, SNESL's accreditation fate was ultimately in the hands of a third party, the ABA. This is a fact that Rodi and every other SNESL student had squarely confronted when the ABA denied the school's accreditation in August of 1997. Accordingly, Rodi acted unreasonably in crediting Larkin's promise that an entity over which Larkin had no control would do something. See Kuwaiti Danish Computer Co. v. Digital Equip. Corp., 781 N.E.2d 787, 795 (Mass. App. Ct. 2004) (holding

plaintiff's reliance on defendant's representation regarding a deal's finality unreasonable because plaintiff should have been aware that a third-party had final approval authority).

Finally, prior to his statement in September of 1997 Larkin had been exposed as a flawed prognosticator. In a letter to Rodi prior to the first denial of accreditation in August of 1997, Larkin wrote that he was "highly confident" that SNESL would gain accreditation in August. Larkin's history of making inaccurate predictions rendered any reliance on his statements unreasonable. As the proverb provides, "fool me once -- shame on you, fool me twice -- shame on me."[8]

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[8] Similarly, a development following the September 1997 meeting also should have convinced Rodi to ignore Larkin's promise. Rodi claims that at the meeting Larkin promised the "student body" that SNESL would be accredited before they graduated. Such a body would have included third year law students slated to graduate in May or June of 1998. Once that latter date came and went, accompanied by Larkin's broken promise to the third year students, Rodi had yet another reason to doubt Larkin's statement.

We now turn to Dean Prentiss's statement. In a letter sent to Rodi in July of 1998 Prentiss stated, "[T]here should be no cause for pessimism about the school's ultimate achievement of ABA approval." Rodi acted unreasonably in relying on this statement simply because its content, regardless of its accuracy, offered little to hold onto. Aside from being, at best, a lukewarm endorsement of the school's likelihood of attaining accreditation, the fact that the Dean was specifically discussing the school's "ultimate accreditation" should have meant very little to Rodi. Unlike Larkin, who promised accreditation before Rodi graduated, Prentiss did not go as far. This was the summer after Rodi's first year of law school and his window of opportunity to graduate from an accredited law school was rapidly closing. By putting faith in a dean's weak prediction of ultimate accreditation, he acted not only improvidently but unreasonably.

Rodi, nevertheless, argues that his reliance was reasonable. First, he contends that it

was reasonable for him to rely on statements made by the deans because he trusted them. Second, he argues that, at the least, the reasonableness of his reliance is a question for the jury. His arguments are unavailing. First, even if Rodi trusted his deans, both the content and context of their statements -- detailed above -- made his reliance unreasonable. See Collins v. Huculak, 783 N.E.2d 834, 840 (Mass. App. Ct. 2003) (holding reliance by sons on father's representations unreasonable because of circumstances surrounding representations, despite the fact that sons claimed they trusted their father). Second, it is settled law that the reasonableness of a party's reliance is not necessarily a jury question. See Saxon Theatre Corp., 200 N.E.2d at 244-45.

In sum, at trial Rodi would be charged with persuading a jury that, among other things, he relied on the word of his deans and that his reliance was reasonable. Given the grave deficiencies present in both the reliance and reasonable reliance elements of his claim, we are convinced that no reasonable

jury could be so persuaded. See Bennett v. Saint-Gobain Corp., 507 F.3d 23, 30 (1st Cir. 2007) (noting that where the "nonmovant-plaintiff has the burden of proof, the evidence adduced on each of the elements of his asserted cause of action must be significantly probative in order to forestall summary judgment") (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)). Accordingly, the district court correctly entered summary judgment in favor of SNESL.

B. Chapter 93A

Rodi also claims that SNESL's actions violated a consumer protection statute, Mass. Gen. Laws ch. 93A, §§ 2, 9.[9] Chapter 93A makes unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Mass. Gen. Laws ch. 93A, § 2(a). "Conduct is unfair or deceptive if it is 'within at least

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[9] Although SNESL claims that Rodi did not comply with the thirty-day demand letter requirement, the district court nonetheless reached the substance of the claim. We follow its lead.

the penumbra of some common-law, statutory, or other established concept of unfairness' or 'immoral, unethical, oppressive or unscrupulous.'" Cummings v. HPG Int'l Inc., 244 F.3d 16, 25 (1st Cir. 2001); see also Travis v. McDonald, 490 N.E.2d 1169, 1171 (1986).

In order for Rodi to recover under Chapter 93A based on his claim of fraudulent misrepresentation he must prove reasonable reliance. See Trifiro v. N.Y. Life Ins. Co., 845 F.2d 30, 33 n.1 (1st Cir. 1988); Mass. Laborers' Health & Welfare Fund, 62 F. Supp. 2d at 243 (holding plaintiff could not recover under Chapter 93A for claim based on fraud where plaintiff failed to prove reliance on false statements was reasonable). As discussed above, that is not possible here. We therefore conclude the district court correctly entered summary judgment for SNESL on this count.

C. Recusal and Motion for Reassignment

Finally, Rodi argues that the district judge should not have presided over his case for two

reasons. First, he claims that the district judge should have recused herself from his case because she had spoken at an SNESL graduation, had received an honorary degree from the school, and had spoken favorably of their accreditation efforts. Second, he argues that, at the very least, on remand the judge should have reassigned his case. As to this point, he contends that a judge should only retain a matter if doing so would result in a substantial savings of time. Because no answer had been filed and no discovery had been conducted, he argues that in his case that was not the situation.

Rodi did not file a motion for recusal with the district court but rather a motion for reassignment. In that motion, he claimed only that the court should reassign the case because retaining the case would not result in a substantial savings of time. Accordingly, Rodi's recusal argument is waived. See United States v. DiPina, 230 F.3d 477, 486 (1st. Cir. 2000); In re Abijoe Realty Corp., 943 F.2d 121, 127 (1st Cir. 1991).

However, Rodi's claim that the district judge should have granted his motion for reassignment under Local Rule 40.1(K)(2) is properly before us. Under 40.1(K)(2), when this court remands a case to the district court, the district judge must reassign the case unless either (1) "the terms of the remand require that further proceedings be conducted before the original judge" or (2) the judge determines that retaining the case will result in a substantial savings of time and the interest of justice does not require that further proceedings be conducted before a different judge. We review the district court's application of its local rule for an abuse of discretion. Crowley v. L.L. Bean, Inc., 361 F.3d 22, 25 (1st Cir. 2004).

There was no abuse of discretion. The judge found that retaining the case would result in a substantial savings of time because the Court was familiar with the background and procedural history of the case and had already conducted a status conference with the parties. As such, she acted well

within her discretion in declining to reassign Rodi's case. See Conley v. United States, 323 F.3d 7, 15 (1st Cir. 2003) (noting circuit's practice of giving deference to district court's reassignment policies).

III. Conclusion

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

No. 07-1770

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOSEPH RODI

Plaintiff - Appellant

v.

SOUTHERN NEW ENGLAND SCHOOL OF LAW;
FRANCIS J. LARKIN; DAVID M. PRENTISS

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PETITION FOR PANEL REHEARING AND SUGGESTION FOR PANEL REHEARING EN BANC BY APPELLANT JOSEPH RODI PURSUANT TO FED .R. APP. P. 40

Joseph Rodi:
PRO-SE
675 Woodland
Avenue
Cherry Hill, NJ
08002
856-662-6177

Date: July 14, 2008

TABLE OF AUTHORITIES

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NOW COMES Appellant Joseph Rodi ("Rodi") and pursuant to Fed. R. App. P. 40 hereby petitions this Court for a Panel Rehearing of the Order dated June 30, 2008 denying his appeal and affirming the grant of summary judgment by the District Court (Gertner, J.). Rodi also suggests a panel rehearing *en banc*.

1. Legal basis for Request

Rodi is aware of the limited nature of Fed. R. App. P. 40 and thus requests reconsideration of the Order on the narrow grounds that he believes this Court has misapprehended certain facts of this case. See 20A-340 Moore's Federal Practice, § 340.10. Rodi does not seek to reargue the case anew. Rather, Rodi wishes to bring to the Court's attention specific facts which may not have been considered by the Court in reaching its decision.

2. **Additional documents submitted**

In support hereof, Rodi submits several pages of his deposition testimony and a letter he wrote to acting Dean Prentiss. See Exhibits 1 and 2, attached. These additional materials were not originally submitted as part of the Record Appendix, but they should be considered now because they address precisely the issues on which this Court based its June 30, 2008 ruling.

The deposition should be considered because (1) portions of the Rodí deposition not previously filed played a critical part in the adjudication of claims presented; (2) the record does not accurately disclose what occurred in District Court without addition of these portions; and (3) the Rodi deposition was available to the District Court and in play at oral argument. (Transcript on Motion before the District Court, e.g. p. 25 line 23.)

Under the facts of this case, the incomplete nature of the record prevented any sort of conclusive determination on the transfer to a New Jersey accredited law school. The deficiency to withdrawal transfer applications which informed the holding in the panel opinion did not stem from either a settled factual predicate or legally insufficient allegations, but from perceived voids in the evidentiary landscape.

3. Specific Factual Point Addressed In This Petition - The Reliance By Rodi On His Law School Deans' Misrepresentations.

Pursuant to Fed. R. App. P. 42(a)(2), Rodi asserts that the Court incorrectly found that he produced no evidence that he relied on the deans' misrepresentations to him regarding the American Bar Association ("ABA") accreditation chances of his law school, the Southern New England School of Law ("SNESL"). As is well known to this Court, Rodi's essential claim in this case is that the deans of SNESL knowingly misrepresented the school's chances of ABA accreditation in order to induce him to forego other professional opportunities and remain at the school. Rodi has consistently maintained: (1) that he did rely on the statements of the deans; and (2) that his reliance was reasonable.

This Court ruled that no reasonable jury could find that Rodi relied on the statements of the deans

promising accreditation. Order, p. 9. This Court found that Rodi chose not to withdraw his applications to Rutgers and Seton Hall law schools in spite of Dean Prentiss' letter. "Rodi's failure to offer an explanation for his unyielding pursuit of a transfer is damning." Id.

Rodi avers that this Honorable Court is simply incorrect as a matter of fact: *Rodi did rely on Prentiss' letter: (1) Rodi's application to other law schools occurred prior to his receiving Prentiss' letter; and (2) after receipt of the letter. Rodi abandoned following up on the Rutgers application.*

This testimony is found in Rodi's deposition:

> Atty. Houlding: Acting Dean Prentiss says in the first sentence of Exhibit 5 [his letter of July 27, 1998] that he understands you may be seeking to transfer to

another law school. Do you see that?

Rodi: Yes.

Atty. Houlding. Is it the case that you were planning to transfer out of Southern New England School of Law in the summer of '98?

Rodi: Yes.

...

Atty. Houlding. Well, you had requested transfer to Rutgers and Seton Hall at the same time, right?

Rodi: ***No. Obviously I did it prior to receiving the letter. Obviously those applications were made prior to receiving the letter.***

...

Atty. Houlding. After you received Exhibit 5 from acting Dean Prentiss, did you withdraw any of the applications that you had pending at Rutgers and Seton Hall Law School?

Rodi: ***Yes. Rutgers, they had asked for some additional information and that denial didn't come until, as I said, a little bit into the fall semester and I didn't pursue it because I relied on the statements contained within the letter.***

See Rodi depo. trans., p. 96, ln. 5 - p. 109, ln. 22. Excerpts of the Deposition of Joseph Rodi are attached hereto as Exhibit 1.

In addition, Rodi wrote a reply to Dean Prentiss during the summer of 1998, prior to the commencement of his second year. This letter, dated August 14, 1998, reflects Rodi's wholehearted acceptance of Prentiss' enticements to stay at SNESL. This letter shows the unequivocal confidence Rodi placed in Prentiss and the school:

> "I am in receipt of your letter dated July 27th which indicates the amounts of progress Southern New England School of Law has made towards ABA accreditation. Having witnessed the careful attention given this matter over the past academic year, I am in agreement with your assessment. My decision to have made applications to other law schools was based largely on a desire to follow-up on past commitments, prayers and promises. For this reason, I applied - not from a sense of pessimism about the school's ultimate achievement of ABA approval. I believe the Southern New England School of Law will succeed in achieving this goal."

Letter from Rodi to Prentiss dated August 14, 1998, attached hereto as Exhibit 2.

This reply letter from Rodi to Prentiss was also addressed at Rodi's deposition:

Atty. Houlding.	Did you respond in writing to David Prentiss?
Rodi:	... Yes. I responded to him in action by remaining at the Southern New England School of Law and also in writing. And I told him that I believed in him and the school and I remained there.
Atty. Houlding.	At the time you told him you believed in him and in the school, was that true?

Rodi: Yes. I relied on everything they were saying.

Depo trans. p. 108, ln. 9 - ln. 22.

Rodi has rendered testimony at deposition which raises a genuine issue of material fact as to whether he relied on the deans' statements:

Rodi: I believed [Prentiss], yes. I believed what he was saying and that what he was saying would be enough. He certainly made it clear in that letter there is no calls for pessimism. As the dean, I know he was certainly in a better position than me to know that and certainly the cumulation of the entire letter, in my mind, he implies the existence of facts that he knw that he perhaps was the only one in a position to know. Certainly not me. . . . He knew my ultimate goal was to attend an accredited law school and to sit for the New Jersey bar.

...

Atty. Houlding:	What is it that you think David Prentiss knew in July of '98 when he sent you this letter that he did not tell you?
Rodi:	That they would not get accredited.
Atty. Houlding:	What is the basis of your belief that he believed that the school would not be accredited?
Rodi:	They were far too short on the standards for accreditation.

See Rodi depo trans., p. 100 ln. 20 - p. 103 ln. 8 and p. 105 ln 18 - p. 106 ln. 1.

Rodi did not address the failure to withdraw the transfer applications in the briefs below because (1) it was not a developed argument or defense that plaintiff did not withdraw the applications; and (2) the critical conduct in this case is the misleading

statements themselves and there inducement of an earnest man to rely to his detriment on those statements.

4. **Rodi did precisely what this Court stated he should have done: proffer evidence that he did not withdraw his transfer applications because of the "hassle" of doing so.**

This Court ruled that Rodi easily could have offered plausible explanations for his failure to withdraw his transfer applications that would have been compatible with his assertion that he relied on the deans' statements. See Order, p. 9-10. In a footnote, this Court suggested that mere "hassle" of doing so could have sufficed as a plausible explanation. Id., ft. 5.

In fact, this is *precisely* the case here. Rodi testified that he did not pursue the Rutgers application after he received the Prentiss letter, and Rutgers had "asked for some additional information"

but he did not pursue it because he "relied on the statements contained within the letter" and stayed at SNESL.

Rodi depo trans, p 109 ln. 18 - 22.

Upon consideration of the deposition transcript of Rodi and the letter Rodi wrote to Prentiss, this Court should credit Rodi's claim that he relied on the deans' promises of accreditation. This Court should not supplant the jury's role as factfinder and instead should permit Rodi his trial on the promises which were made to him nearly ten years ago.

5. The question of whether Rodi's reliance was reasonable is a question of fact. A reasonable jury could find that rather than being mere "flawed prognosticators", the deans were furnishing misleading fragmentary disclosures which are actionable under the ruling of V.S.H. Realty, Inc., v. Texaco, Inc.

The case of V.S.H. Realty, Inc., v. Texaco, Inc., 757 F.2d 411 (1st Cir. 1985), held that misleading fragmentary disclosures are actionable.

Under Massachusetts law, even if a statement is viewed as a representation as to a future event, it still may be actionable if it involves a situation "where the parties to the transaction are not on equal footing but where one has or is in a position where he should have superior knowledge concerning the matters to which the misrepresentations relate." Williston on Contracts, sec. 1496, at 373-374 (3d ed. 1970); Goppen v. American Supply, 407 N.E. 2d 1255 (1979); Celluci v. Sun Oil Co., 2 Mass.App. 722, 730, 320 N.E.2d 919, 924 (1974), id., 368 Mass. 811, 331 N.E.2d 813 (1975).

Here, as deans of the school, Larkin and Prentiss were in a much better position than the students to know the facts underlying their promises

and representations, insofar has they had intimate knowledge of the school's compliance (or lack thereof) with the ABA requirements and had substantial contact with the ABA in their role as heads of the school.

This Court ruled that no reasonable jury could find Rodi's reliance to have been reasonable, even if the following facts were proven true (pursuant to Hadfield v. McDonough, 407 F.3d. 11, 14 (1st Cir. 2005):

(1) Dean Larkin promised that the ABA would grant SNESL accreditation, informing Rodi "The school will be accredited by the ABA the next time around and before you graduate (Order, p. 3-4);

(2) After Rodi's first year at SNESL, Acting Dean Prentiss wrote to him: "[T]here should be no cause for pessimism about the school's ultimate achievement of ABA approval (Order, p. 4);

(3) During discovery it was revealed that when the deans made these statements *they privately had concerns regarding SNESL's prospects for accreditation*. Dean Larkin said that after the first rejection he was not "highly confident" that SNESL's renewed application would be successful. Similarly, Dean Prentiss recognized SNESL was on the low end of the spectrum with regards to the resources necessary to garner accreditation (Order, p. 4);

(4) The ABA rejected SNESL's second application for accreditation and did not recommend it for provisional accreditation, citing SNESL's failure both to comply with the ABA standards and to present a reliable three-year plan for complying with the standards.

(5) Robert Desidario, the school's ABA consultant regarding ABA accreditation, stated that

there was cause for pessimism and therefore Mr. Prentiss' statement that there was "no cause for pessimism" was incorrect as a matter of fact. See App. p. 80 - 81 (Affidavit of Jonathan Plaut).

Only SNESL and its deans -- not Rodi -- knew what SNESL had to do in order to obtain ABA accreditation. Rodi had no means to independently ascertain the truth of SNESL's assurances. Even if he could have somehow done so, under Massachusetts law a victim of fraud has no specific duty to ascertain the truth. Snyder v. Sperry & Hutchinson Co., 368 Mass. 433, 446, 333 N.E.2d 421 (1975).

In fact, the duty to avoid misrepresentations is so strong that "the deceived party is not charged with failing to discover the truth." V.S.H. Realty, 757 F.2d at 415; see Snyder, 368 Mass. at 446.

The panel opinion cites by footnote #8 p. 13 that by "Larkin's broken promises to third year students, Rodi had yet another reason to doubt Larkin's statement". This is simply not accurate. The application before the ABA had not yet been submitted because the ABA requires a 10-month waiting period before reapplication. By function of ABA Rule 11, the third year students could not possibly benefit from ABA accreditation. (Rule 11 ABA General Provisions: Section of legal education).

"Third year students, for whom accreditation was necessary or important, began to convert from full-time to part-time enrollment to compensate for the ABA's time requirement for reapplication. See Rodi Opposition to Dismissal to the Appellee's Motion to Dismiss under Rule 12(b)(6) at 4. The panel opinion held Rodi's reliance unreasonable because Larkin's Statement was "palpably false". As

previously stated and argued before the district court a jury could certainly find reliance reasonable.

It is widely believed among legal educators and regulatory organizations that compliance with the ABA Standards for accreditation enhances the quality of legal education.

Federal law provides criteria by which a Department of Education-approved accreditor must review an applicant law school. See 20 U.S.C. Section 1099b(a)(5) (requiring the accreditor to assess the institution's curricula, faculty, physical facilities, fiscal stability, student services, program length, degrees offered, and history of student complaints.) The Standards promulgated by the ABA follow section 1099b's framework. Massachusetts School of Law at Andover, LLC. v. American Bar Association 142 F.3d 26 at 31 (First Circuit Court of Appeals)

If a school is found not to be in compliance with the Standards, the Committee for ABA accreditation nonetheless may recommend provisional accreditation *if it receives satisfactory* assurances that the applicant will achieve compliance within three years. *See* Standard 104(a).

The applicant law school can show compliance with the ABA criteria for accreditation either actual or anticipated.

At no time did **SNESL** present compliance with the Standards or a reasonable plan to be compliant within three years of ABA approval.

While the panel decision suggests that the accreditation decision rests in a third party's hand, as the case may be, the applicant law school should not purport to know something or presume to control or predict. The compliance with the criteria for ABA

approval rests in the hands of the applicant law school.

Much of the criteria the ABA found SNESL deficient are internal matters not possibly known to Plaintiff-Appellant at all relevant times. e.g. among those #1-18 Appellant's Opposition to Summary Judgment p.8 – 10.

The Prentiss letter was sent to Rodi at his home in New Jersey in July of 1998. At all times relevant, Prentiss knew Rodi lived in New Jersey, maintained a home in New Jersey where his wife remained and worked as a teacher, and intended to return to practice law. The Prentiss letter's audience was intended for and directed to Rodi specifically. The reader's reliance on the statement that "there should be no cause for pessimism about the school's ultimate achievement of ABA approval" is reasonable in the context in which it was written. Prentiss knew

that ABA approval was of critical importance and such a letter should not challenge the reader's critical wits; concluding that by ultimate approval he meant in the very distant future. Ten years have passed and SNESL remains unaccredited. In the same vein, SNESL Professor Edward Greer who was one of the individuals who prepared the ABA application stated [regarding the promise of accreditation] was "the swindle of the students"; and further, the ABA Consultant to SNESL, Robert Desiderio, said the Prentiss letter was "widely overstated". See Appendix p. 80 – 81. (Affidavit of Jonathan Plaut).

6. **Whether Rodi's Motion for Reassignment was an abuse of discretion is a question of law; the panel's opinion renders Local Rule 40.1(k)(2) largely meaningless.**

In another suit filed against SNESL by a classmate of Rodi, Jolicouer v. Southern New

England School of Law, et. al. 104 Fed. Appx. 745, plaintiff filed a motion for recusal but the motion was denied by the same judge (Gertner, J.). Jolicouer's motion was never addressed by the Court of Appeals. Accordingly, for Rodi to have filed another motion on the precise issue before the same judge would have been futile.

While the District Court's order acknowledges "the reassignment rule is effectively a rule of disqualification" (Electronic Order denying Motion to Reassign), the District Court did abuse its discretion in finding that a substantial savings of judicial economy and time should prevail over a timely filed Motion for Reassignment pursuant to Local Rule 40.1(k)(2). The Motion for Reassignment entered on August 04, 2005 less than 30 days following a status conference and no filings were pending before the Court. With respect to judicial economy and savings

of time seven (7) months had lapsed prior to the call for a status conference from the remand in the instant case. The district court's, first impression of the case, was a dismissal on a 12(b)(6) motion to dismiss by a minute order less than 30 days of the original *pro se* complaint filing.

Rodi did claim and provided reasoned argument that the district judge should have recused herself from his case because she had spoke at an SNESL graduation, had received an honorary degree from the school, and had spoken favorably of their accreditation efforts.

CONCLUSION

For the reasons set forth above, this Petition should be granted, the panel's decision vacated, and the district court's order reversed.

Respectfully Submitted,
/s/ Joseph S. Rodi
Joseph S. Rodi

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2008 I caused a copy of the foregoing to be hand delivered to counsel for Appellees, Attorneys Allen L. David, Esq. and Elizabeth A. Houlding, Esq., Peabody & Arnold, LLP, 30 Rowes Wharf, Boston, MA 02110.
/s/ Joseph S. Rodi

Joseph S. Rodi

TYPEFACE/ LENGTH LIMIT CERTIFICATE OF COMPLIANCE

Pursuant to Loc. R. 32 (a) (7), I hereby certify that the typeface of this brief is Times New Roman 14 point font, and that I have complied with all applicable rules governing the filing of this brief to the best of my ability.

/s/ Joseph S. Rodi

Joseph S. Rodi

*389 F.3d 5, *; 2004 U.S. App. LEXIS 23486, ***

JOSEPH RODI, Plaintiff, Appellant, v. SOUTHERN NEW ENGLAND SCHOOL OF LAW ET AL., Defendants, Appellees.

No. 03-2502

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

389 F.3d 5; 2004 U.S. App. LEXIS 23486

November 10, 2004, Decided

SUBSEQUENT HISTORY: As Amended, November 18, 2004

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. [Hon. Nancy Gertner, U.S. District Judge]. Rodi v. S. New Eng. Sch. of Law, 255 F. Supp. 2d 346, 2003 U.S. Dist. LEXIS 5869 (D.N.J., 2003)

DISPOSITION: Affirmed in part, reversed in part, and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff graduate sued defendants, a law school, a dean, and an acting dean, alleging fraudulent misrepresentation and a violation of the Massachusetts Consumer Protection Act (MCPA), Mass. Gen. Laws ch. 93A, §§ 1-11. The United States District Court for the District of Massachusetts granted defendants' motion to dismiss. The graduate appealed.

OVERVIEW: The graduate alleged that letters from the dean and acting dean containing misrepresentations regarding future accreditation induced him to enroll at the unaccredited law school and to stay at the law school after accreditation was denied. The court determined that dismissal of the fraudulent misrepresentation claim was not warranted, because (1) the graduate sufficiently alleged a fraudulent misrepresentation claim based upon the false statements, (2) the statement that the law school was "highly confident" of accreditation could have been actionably misleading, (3) under Fed. R. Civ. P. 9(b), the letters were sufficiently specific as to speaker, content, context, and time, (4) the accreditation disclaimer in the law school's catalogue did not render the graduate's reliance unreasonable, and (5) the claim was not time-barred under Mass. Gen. Laws ch. 260, § 2A, because the savings statute, Mass. Gen. Laws ch. 260, § 32, applied based upon an antecedent suit that was dismissed. However, the court dismissed the consumer protection claim because the graduate failed to allege compliance with the notification requirement of the MCPA.

OUTCOME: The appellate court reversed the

district court's order insofar as it dismissed the fraudulent misrepresentation count. The appellate court affirmed the district court's order insofar as it dismissed the consumer protection count, but directed that the graduate be afforded leave to amend that count.

CORE TERMS: accreditation, fraudulent misrepresentation, misrepresentation, disclaimer, savings, motion to dismiss, statute of limitations, pro se, particularity, fraudulent, notice, order of dismissal, actionable, pessimism, catalogue, enrolled, dean, summary judgment, judicial notice, prerequisite, diversity, falsely, annexed, pleaded, actionable claim, graduation, proffered, near-term, confident, elected

JUDGES: Before Torruella, Selya and Howard, Circuit Judges.

OPINION BY: SELYA

OPINION: [*9] **SELYA, Circuit Judge.** This is an appeal from a terse order dismissing a nine-count civil complaint for failure to state a claim upon which relief might be granted. Because it is impossible to tell what arguments the district court found persuasive, we have canvassed the field. We conclude that the complaint states one potentially actionable claim and another that is not beyond hope of repair. Consequently, we reverse the order of dismissal in part and remand for further proceedings.

I. BACKGROUND

Because this is an appeal from an order under Fed. R. Civ. P. 12(b)(6), we take the facts as they are alleged in the plaintiff's complaint. n1 SEC v. SG Ltd., 265 F.3d 42, 44 [*10] (1st Cir. 2001); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998). [**2] We ignore, however, "bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, [and] outright vituperation." Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990). Once the scene is set, we recount the travel of the case.

n1 Although the parties submitted affidavits in the district court, we eschew any reliance on the factual averments contained therein, with a few exceptions that we elucidate below. We explain why in Part II(A), infra.

A. The Facts.

In July of 1997, plaintiff-appellant Joseph Rodi, a would-be law student who resided in New Jersey, received a recruitment letter from Francis J. Larkin, dean of Southern New England School of Law (SNESL). The letter stated in pertinent part that the accreditation committee of the American Bar Association (ABA) had voted to recommend SNESL for "provisional accreditation," a status that would be granted upon ratification of the recommendation by two other ABA bodies. The letter also stated that SNESL [**3] was "highly confident" of receiving the needed ratifications and that the future of the school

"has never been brighter." Because the plaintiff intended to take the New Jersey bar examination, the prospect of accreditation was critically important to him; New Jersey requires bar applicants to hold law degrees from ABA-accredited institutions.

Larkin's letter ended with a pitch for enrollment. The solicitation bore fruit; the plaintiff enrolled at SNESL that month. He received a catalogue from SNESL containing, inter alia, a statement (in the same type size and font as the surrounding text) to the effect that: "The Law School makes no representation to any applicant or student that it will be approved by the American Bar Association prior to the graduation of any matriculating student." The complaint alleges that, despite the cheery optimism of Larkin's letter, the dean knew full well that SNESL had identifiable deficiencies that would almost certainly preclude ABA accreditation.

The ABA denied SNESL's application for accreditation in September of 1997. As a result, the plaintiff considered transferring to an accredited law school for his second year of study. Word of his ambivalence [**4] reached the dean's office. David M. Prentiss, who was then the acting dean, wrote to the plaintiff in order to "make sure" that he was "fully informed of the school's current status regarding ABA accreditation." That communique stated in substance that the school had improved the four areas found deficient by the ABA and that there should be "no cause for pessimism" about the school achieving accreditation before the plaintiff's forecasted graduation date.

In reliance on these and other representations -- all of which the complaint says were knowingly false -- the plaintiff remained at SNESL. He came to regret the choice: according to the complaint, SNESL knew, but elected not to disclose, that the ABA was highly critical of SNESL; that any faint hope of attaining accreditation depended upon a complete overhaul of the faculty, administration, curriculum, and student body; and that the level of non-compliance made the prospect of SNESL's near-term accreditation remote. To compound this mendacity, the school frustrated students' attempts to learn about the true status of the accreditation pavane.

In November of 1999 -- during the plaintiff's third year of legal studies -- the ABA denied [**5] SNESL's renewed application for accreditation. SNESL failed to appeal to the ABA's House of Delegates as it previously had promised. Instead, the school cashiered half of its full-time faculty, thereby straying even further from ABA-mandated standards.

[*11] The plaintiff completed his studies in June of 2000. SNESL remained unaccredited. Notwithstanding his diploma, the plaintiff has not been able to sit for the New Jersey bar examination.

B. Travel of the Case.

On July 18, 2002, the plaintiff sued SNESL, Larkin, and Prentiss in the United States District Court for the District of New Jersey. The district court dismissed that action for want of in personam

jurisdiction on April 10, 2003. Rodi v. S. New Eng. Sch. of Law, 255 F. Supp. 2d 346, 351 (D.N.J. 2003). On June 9, 2003, the plaintiff, acting pro se, sued the same defendants in the United States District Court for the District of Massachusetts. Grounding jurisdiction in diversity of citizenship and the existence of a controversy in the requisite amount, 28 U.S.C. § 1332(a), his complaint incorporated copies of the Larkin and Prentiss letters and limned nine statements of claim. [**6]

We confine our discussion to the two claims that the plaintiff presses on appeal: (i) that the defendants' statements constituted actionable fraud or misrepresentation, and (ii) that SNESL's actions violated a consumer protection statute, Mass. Gen. Laws ch. 93A, §§ 1-11. The defendants filed a timely motion to dismiss, positing that the complaint, for a variety of reasons, failed to state a claim upon which relief could be granted. As to the fraudulent misrepresentation count, the defendants asseverated that the "misrepresentations" were non-actionable statements of opinion; that the supposed fraud had not been alleged with the requisite particularity; that, in all events, the plaintiff's professed reliance on those statements was unreasonable; and that the statute of limitations had run. With respect to the Chapter 93A count, the defendants averred that the complaint failed to state an actionable claim because the alleged misrepresentations were insufficient to trigger the prophylaxis of the statute, and, moreover, the complaint failed to allege that a demand letter had been sent before suit. See Mass. Gen. Laws ch. 93A, § 9(3).

The plaintiff, still [**7] acting pro se, filed an opposition to the motion to dismiss in which he made a point-by-point rebuttal of the defendants' asseverations. As part of his opposition, he tendered five affidavits, two additional letters, and an array of other documents. SNESL filed a reply and, not to be outdone, proffered a welter of documents (including copies of its catalogues for the years in question).

The district court abjured oral argument and ruled on the papers. It entered a cryptic order, providing in its entirety that the motion to dismiss should be allowed "for substantially the reasons outlined in defendants' memorandum of law." The plaintiff promptly moved for reconsideration, suggesting, among other things, that if the district court "found the complaint's allegations too scanty, it could have granted leave to amend." The court denied the motion without comment. This counseled appeal ensued.

II. DISCUSSION

We divide our discussion of the issues into several segments. First, we ascertain what materials are properly before us. We then proceed count by count and theory by theory. In so doing, we omit any reference to the seven counts that the plaintiff has elected not to defend [**8] on appeal.

A. Configuring the Record.

The threshold issue here involves a determination of what legal standard the district court applied (or should have applied) in examining the pleadings

before it. [*12] The defendants styled their motion as a motion to dismiss, but the parties then proffered exhibits containing information extraneous to the complaint. That presents a quandary.

The Civil Rules provide that when "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Fed. R. Civ. P. 12(b). The district court's order is silent as to whether it elected to convert the motion to a motion for summary judgment. Consequently, we must decide "whether the court actually took cognizance of [the supplemental material], or invoked Rule 56, in arriving at its decision." Garita Hotel Ltd. P'ship v. Ponce Fed. Bank, 958 F.2d 15, 19 (1st Cir. 1992).

The state of this record is tenebrous. We do know, however, that the district court embraced the defendants' memorandum of law -- and that memorandum relied upon the [**9] Rule 12(b)(6) standard, not the quite different Rule 56 standard. In the same vein, both sides have briefed the case on appeal as if Rule 12(b)(6), rather than Rule 56, controls. Under the unique circumstances of this case, considerations of fundamental fairness counsel in favor of following the parties' and the lower court's lead and testing the arguments on appeal under the jurisprudence of Rule 12(b)(6). We adopt that course.

Once that decision has been made, the standard of review becomes straightforward. Orders granting motions to dismiss under Rule 12(b)(6) engender de novo review. Mass. Sch. of Law at Andover, Inc. v.

Am. Bar Ass'n, 142 F.3d 26, 40 (1st Cir. 1998). In ruling on whether a plaintiff has stated an actionable claim, an inquiring court, be it a trial or appellate court, must consider the complaint, documents annexed to it, and other materials fairly incorporated within it. In re Colonial Mortg. Bankers Corp., 324 F.3d 12, 15-16 (1st Cir. 2003); Cogan v. Phoenix Life Ins. Co., 310 F.3d 238, 241 n.4 (1st Cir. 2002). This sometimes includes documents referred to in the complaint but not annexed to it. See [**10] Coyne v. Cronin, 386 F.3d 280, 2004 U.S. App. LEXIS 21178, (1st Cir. 2004); Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998); Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988). Finally, "[t]he jurisprudence of Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice. Colonial Mortg. Bankers, 324 F.3d at 15-16; Boateng v. InterAmerican Univ., 210 F.3d 56, 60 (1st Cir. 2000).

Giving force to these principles, we may consider on this appeal the facts alleged in the complaint, the Larkin and Prentiss letters (which were annexed to it), and any matters that may be judicially noticed. We also may consider SNESL's 1997-1998 catalogue, alleged by the plaintiff to comprise a part of the contract between the parties, as a document fairly incorporated into the complaint. See Beddall, 137 F.3d at 17. However, we may not consider at this stage the array of affidavits and miscellaneous documents proffered by the parties.

Having identified the materials that are properly before us, we briefly address the question of affirmative defenses. On a [**11] Rule 12(b)(6)

motion, the court's inquiry sometimes may encompass affirmative defenses. Everything depends on the record. [HN5] As a general rule, a properly raised affirmative defense can be adjudicated on a motion to dismiss so long as (i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information, and (ii) those facts suffice to establish the affirmative defense with certitude. Colonial Mortg. Bankers, 324 F.3d at 16.

[*13] Against this backdrop, we examine the bases on which the district court could have predicated its decision. We take each count and each ground in turn.

B. The Fraudulent Misrepresentation Count.

The defendants advance a motley of potential defenses to the plaintiff's fraudulent misrepresentation claim. We address them sequentially.

1. In General. We start by testing the vitality of the claim as a whole. [HN6] We will uphold a dismissal on this ground "only if the plaintiff's factual averments hold out no hope of recovery on any theory adumbrated in [his] complaint." Id. at 15 (citing Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999)). [**12] Our task is not to decide whether the plaintiff ultimately will prevail but, rather, whether he is entitled to undertake discovery in furtherance of the pleaded claim. Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). In this process, the fact that the plaintiff filed the

complaint pro se militates in favor of a liberal reading. See Boivin v. Black, 225 F.3d 36, 43 (1st Cir. 2000) (explaining that "courts hold pro se pleadings to less demanding standards than those drafted by lawyers").

[1] Sitting in diversity, we look to the substantive law of the forum state (here, Massachusetts) to guide our analysis. Correia v. Fitzgerald, 354 F.3d 47, 53 (1st Cir. 2003). [2] Under Massachusetts law, a claim for misrepresentation entails a false statement of material fact made to induce the plaintiff to act and reasonably relied upon by him to his detriment. Zimmerman v. Kent, 31 Mass. App. Ct. 72, 575 N.E.2d 70, 74 (Mass. App. Ct. 1991). The plaintiff's claim passes this screen.

As to Larkin, the complaint, read liberally, alleges the following: (i) Larkin knew that the plaintiff was a New Jersey resident who wanted to [**13] practice law there; (ii) he also knew that the plaintiff could not sit for the New Jersey bar unless he graduated from an accredited law school; (iii) he sent a letter to the plaintiff in New Jersey stating that SNESL was "highly confident" of receiving accreditation, knowing that this statement was materially false because SNESL had substantial deficiencies that would make accreditation difficult if not impossible; and (iv) the plaintiff, relying on Larkin's letter, enrolled at SNESL, paid substantial sums for tuition, and invested three years of his life in mastering its curriculum. We think that these allegations, if proven, would make out a viable claim for fraudulent misrepresentation. See Kerr v. Shurtleff, 218 Mass. 167, 105 N.E. 871, 872 (Mass. 1914) (holding that

college committed fraudulent misrepresentation by falsely telling prospective student that it could "make [him] a D.M.D." when student enrolled and graduated but school lacked the authority to grant the degree).

A similar analysis applies to the plaintiff's fraudulent misrepresentation claim against Prentiss. Prentiss's statement that there was "no cause for pessimism" about the prospect of near-term [**14] accreditation is materially false if there was in fact cause for pessimism due to the extent of the school's known shortcomings. The plaintiff alleges that Prentiss knowingly made this false statement in order to induce him to remain enrolled at SNESL and that he (Rodi) took the bait and relied on it to his detriment.

As pleaded, SNESL is vicariously liable for these fraudulent misrepresentations. It is reasonable to infer from the allegations contained in the complaint that Larkin and Prentiss were high-ranking employees of SNESL acting within the scope of their employment. Consequently, [*14] their misrepresentations are attributable to SNESL on respondeat superior grounds. See generally Kavanagh v. Trs. of Boston Univ., 440 Mass. 195, 795 N.E.2d 1170, 1174 (Mass. 2003) (citing Restatement (Third) of Agency § 2.04 (Tent. Draft No. 2, 2001)). Accordingly, the complaint, on its face, states a claim for fraudulent misrepresentation against all three defendants.

2. Matters of Opinion. The defendants' effort to short-circuit this claim is multifaceted. Their first

counter is that the cited statements were, at most, statements of opinion. That is true, in a sense, [**15] but it does not get the defendants very far.

"A statement, though couched in terms of opinion, may constitute a statement of fact if it may reasonably be understood by the reader or listener as implying the existence of facts that justify the statement (or, at least, the non-existence of any facts incompatible with it). See McEneaney v. Chestnut Hill Realty Corp., 38 Mass. App. Ct. 573, 650 N.E.2d 93, 96 (Mass. App. Ct. 1995); *see also* Restatement (Second) of Torts § 539 (1977) (explaining that "[a] statement of opinion as to facts not disclosed [may] be interpreted . . . as an implied statement that the facts known to the maker are not incompatible with his opinion"); cf. Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997) ("A statement couched as an opinion that presents or implies the existence of facts which are capable of being proven true or false can be actionable."). Thus, it is an actionable misrepresentation for a corporation falsely to tell investors that a specific project is "a great success" that is "proceeding smoothly . . . and better than expected" in order to keep [**16] them from pulling the plug. Stolzoff v. Waste Sys. Int'l, Inc., 58 Mass. App. Ct. 747, 792 N.E.2d 1031, 1036-37, 1042 (Mass. App. Ct. 2003). Similarly, it is an actionable misrepresentation for a car dealer to tell a buyer that he "believes" a vehicle is in "good" condition when he knows that it has significant mechanical defects. Briggs v. Carol Cars, Inc., 407 Mass. 391, 553 N.E.2d 930, 933 (Mass. 1990).

The Restatement, favorably referenced in the

Massachusetts cases, gives a stunningly appropriate example:

When an auditor who is known to have examined the books of a corporation states that it is in sound financial condition, he may reasonably be understood to say that his examination has been sufficient to permit him to form an honest opinion and that what he has found justifies his conclusion. The opinion thus becomes in effect a short summary of those facts. When he is reasonably understood as conveying such a statement, he is subject to liability if he . . . has not found facts that justify the opinion, on the basis of his misrepresentation of the implied facts.

Restatement (Second) of Torts § 539, cmt. b [**17] . The parallel is apparent. The plaintiff's complaint alleges that the ABA has formulated certain objective criteria that inform its decisions about whether and when to accredit law schools. It also alleges that Larkin, knowing of these criteria, wrote a letter to the plaintiff implying that the school was reasonably capable of satisfying them. If Larkin did know of disqualifying and probably irremediable deficiencies (as the plaintiff has alleged), his statement that SNESL was "highly confident" of accreditation was actionably misleading. Prentiss's statement that there was "no cause for pessimism" about the fate of the school's renewed accreditation application is subject to much the same analysis.

To be sure, knowing falsity is much easier to allege than to prove. Here, however, the district court jettisoned the fraudulent misrepresentation count at

the pleading stage. Given the liberal standards of Rule 12(b)(6), [*15] that dismissal cannot rest on the "opinion" defense.

3. Failure to Plead With Particularity. For the most part, a civil complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) [**18] . For that reason, "great specificity is ordinarily not required to survive a Rule 12(b)(6) motion." Garita Hotel, 958 F.2d at 17. That proposition, however, is not universally applicable. "Cases alleging fraud -- and for this purpose, misrepresentation is considered a species of fraud -- constitute an exception to [it]." Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 29 (1st Cir. 2004). That exception, codified in Fed. R. Civ. P. 9(b), requires that fraud be alleged with particularity. Id. This heightened pleading standard is satisfied by an averment "of the who, what, where, and when of the allegedly false or fraudulent representation." Id.; accord Powers v. Boston Cooper Corp., 926 F.2d 109, 111 (1st Cir. 1991); McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228-29 & n.2 (1st Cir. 1980) .

In this instance, the defendants assert that the district court was warranted in dismissing the fraudulent misrepresentation claim for failure to abide by these strictures. In addressing that assertion, we note that "the specificity requirement extends only to [**19] the particulars of the allegedly misleading statement itself. See Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004). The other elements of

fraud, such as intent and knowledge, may be averred in general terms. See Fed. R. Civ. P. 9(b).

After careful perscrutation, we deem this line of defense unavailing. The Larkin and Prentiss letters are unarguably specific as to speaker, content, context, and time. These statements are sufficient to shield the fraudulent misrepresentation count from dismissal at the pleading stage. See, e.g., Powers, 926 F.2d at 111; see also Philippe v. Shape, Inc., 688 F. Supp. 783, 786-87 (D. Me. 1988) (holding that documents affixed to complaint that contained alleged misrepresentations satisfied Rule 9(b)).

We note, however, that the complaint attributes a gallimaufry of other substantially similar statements to the defendants. We count no fewer than four such allegedly fraudulent misrepresentations: (i) that a SNESL employee had reported that the 1997 application for accreditation came "within an inch of ABA approval"; (ii) [**20] that an admissions officer proclaimed that SNESL "will be accredited"; (iii) that SNESL claimed it had received a special time waiver from the ABA because its "case [for accreditation] was so strong"; and (iv) that if accreditation were again denied, SNESL would appeal directly to the ABA's governing body. None of these four statements is pleaded with the particularity required under Rule 9(b). Insofar as we can tell from the complaint, each such statement was made by an unidentified person at an unnamed place and at an unspecified time. n2 Such gossamer allegations are patently inadequate under Rule 9(b). See Alternative Sys. Concepts, 374 F.3d at 30; Ahmed v. Rosenblatt, 118 F.3d 886, 889 (1st Cir. 1997).

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n2 We acknowledge that the plaintiff has provided many of the missing details concerning these statements in other filings, such as his affidavits and briefs. Nevertheless, those documents are not eligible for consideration on this appeal. See supra Part II(A).

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"\"When [**21] a claim sounding in fraud contains a hybrid of allegations, some of which satisfy the strictures of Rule 9(b) and some of which do not, an inquiring court may sustain the claim on the basis of [*16] those specific allegations that are properly pleaded. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1105 (9th Cir. 2003); Serabian v. Amoskeag Bank Shares, Inc., 24 F.3d 357, 366 (1st Cir. 1994). So it is here. For that reason, we take no view either as to whether the plaintiff, on remand, should be permitted to amend his complaint to add particulars anent the other four statements or as to whether, absent an amendment, evidence of those statements may be introduced at trial in support of the allegation that the plaintiff reasonably relied on the Larkin and Prentiss letters. In the first instance, such matters, should they arise, are for the district court.

4. Reasonable Reliance. "\"Reasonable reliance is, of course, an element of a fraudulent misrepresentation claim under Massachusetts law. Zimmerman, 575 N.E.2d at 76. The defendants strive

to persuade us that the disclaimer placed in the school's catalogue -- disclaiming any "representation [**22] to any applicant or student that [SNESL] will be approved by the American Bar Association prior to the graduation of any matriculating student" -- renders any reliance by the plaintiff on Larkin's and Prentiss's epistles unreasonable as a matter of law. We are not convinced.

[*17] Under Massachusetts law, the reasonableness of a party's reliance ordinarily constitutes a question of fact for the jury. Mass. Laborers' Health & Welfare Fund v. Philip Morris, Inc., 62 F. Supp. 2d 236, 242 (D. Mass. 1999); Cataldo Ambul. Serv., Inc. v. City of Chelsea, 426 Mass. 383, 688 N.E.2d 959, 962 (Mass. 1998). When, however, the facts alleged in the complaint preclude a finding of reasonable reliance, a court may enter an order of dismissal under Rule 12(b)(6). See, e.g., Mass. Laborers' Health & Welfare Fund, 62 F. Supp. 2d at 242; Saxon Theatre Corp. v. Sage, 347 Mass. 662, 200 N.E.2d 241, 244 (Mass. 1964). The defendants argue that the disclaimer, incorporated by reference in the plaintiff's complaint, makes this such a case.

In mounting this argument, the defendants distort the fraudulent misrepresentation. They insist [**23] that the plaintiff's asserted injury flows from a broken promise of accreditation (i.e., that he was promised accreditation that did not occur). Since the disclaimer flatly contradicts any such representation, the defendants say, reliance on that promise was objectively unreasonable.

This argument erects, and then attacks, a straw man. As said, the plaintiffs complaint alleges that the defendants falsely implied that SNESL had the capacity to achieve near-term accreditation. This is a meaningful distinction. It is one thing for an actor to demur when asked to guarantee a third party's actions. It is quite another for an actor to mislead a person into believing that the actor itself possesses means and abilities fully within its control. Given this distinction, the defendants' reliance on the disclaimer is misplaced: inasmuch as the disclaimer does not cover the alleged misrepresentations, it cannot defeat them. See Hitachi Credit Am. Corp. v. Signet Bank, 166 F.3d 614, 630-631 (4th Cir. 1999) (holding that "a contracting party may recover for fraud notwithstanding "specific disclaimers that do not cover the allegedly fraudulent contract-inducing representations"). [**24]

It is, of course, arguable that the proof at summary judgment or at trial may show that the disclaimer does cover whatever misrepresentations (if any) were actually made. But even if the defendants' characterization of the plaintiffs fraudulent misrepresentation claim was on the mark, we could not affirm the order of dismissal on this ground. We explain briefly.

"Under Massachusetts law, "a party may not contract out of fraud." Turner v. Johnson & Johnson, 809 F.2d 90, 95 (1st Cir. 1986). With this in mind, Massachusetts courts consistently have held that disclaimers do not automatically defeat fraudulent misrepresentation claims. See, e.g., Bates v.

Southgate, 308 Mass. 170, 31 N.E.2d 551, 558 (Mass. 1941); Sound Techniques, Inc. v. Hoffman, 50 Mass. App. Ct. 425, 737 N.E.2d 920, 924 (Mass. App. Ct. 2000); see also VMark Software, Inc. v. EMC Corp., 37 Mass. App. Ct. 610, 642 N.E.2d 587, 594 n.11 (Mass. App. Ct. 1994) (collecting cases).

At the motion to dismiss stage, information such as the conspicuousness of the disclaimer and the parties' discussions concerning it is largely undeveloped. These details [**25] are relevant, as the circumstances surrounding the formation of the contract will shed light upon the disclaimer's meaning and effect. See Turner, 809 F.2d at 96 (stating that when dealing with an ambiguous disclaimer, "the agreement is to some extent left undefined, and the plaintiff's understanding of the agreement logically may be colored by the defendant's prior statements, fraudulent or otherwise"). On an empty record, we would have no principled choice but to decline the defendants' invitation to hold, as a matter of law, that there is no possible set of circumstances under which the disclaimer might prove ineffective. See V.S.H. Realty, Inc. v. Texaco, Inc., 757 F.2d 411, 418 (1st Cir. 1985) (cautioning against deciding whether an exculpatory clause precludes a misrepresentation claim "without development of a factual record").

5. Statute of Limitations. The defendants have a final fallback position. They assert that, even if the fraudulent misrepresentation claim is actionable, it is time-barred. We explore this possibility.

[**26] To a limited extent, a statute of limitations

defense can be considered on a Rule 12(b)(6) motion. See [**26] , e.g., LaChapelle, 142 F.3d at 509. The key is whether the complaint and any documents that properly may be read in conjunction with it show beyond doubt that the claim asserted is out of time. Id.

"\"Massachusetts law provides that an action in tort -- of which fraudulent misrepresentation is a species -- "shall be commenced only within three years next after the cause of action accrues." Mass. Gen. Laws ch. 260, § 2A. A claim for fraudulent misrepresentation does not begin to accrue until "a plaintiff learns or reasonably should have learned of the misrepresentation." Kent v. Dupree, 13 Mass. App. Ct. 44, 429 N.E.2d 1041, 1043 (Mass. App. Ct. 1982); accord Patsos v. First Albany Corp., 433 Mass. 323, 741 N.E.2d 841, 846 (Mass. 2001); McEneaney, 650 N.E.2d at 97. In this context, courts sometimes ask when sufficient indicia of trouble -- storm warnings, so to speak -- should have been apparent to a reasonably prudent person. See, e.g., Wolinetz v. Berkshire Life Ins. Co., 361 F.3d 44, 47-48 (1st Cir. 2004); Young v. Lepone, 305 F.3d 1, 8 (1st Cir. 2002). [**27]

In the case at hand, the plaintiff's complaint alleges that he learned of persistent deficiencies precluding ABA accreditation at an unspecified date in November of 1999. There are no facts alleged in the complaint that require an inference of an earlier accrual date. As of that time, then, the plaintiff should have figured out that the defendants' rodomontade about the school's capabilities and the imminence of accreditation was quite likely pie in the

sky. On that basis, the plaintiff should have commenced his action no later than November of 2002 (the precise date is inconsequential, for reasons that shortly will become apparent). Because this action was not docketed until June 9, 2003, a cursory glance would appear to validate the defendants' assertion that the statute [*18] of limitations had run. See, e.g., Jolicoeur v. S. New Eng. Sch. of Law, 104 Fed. Appx. 745, 746-47 (1st Cir. 2004) (per curiam) (holding a similar action, filed by one of the plaintiff's classmates on June 18, 2003, to be time-barred).

Appearances sometimes are deceiving -- and this is such an instance. Here, unlike in Jolicoeur, the plaintiff filed an antecedent suit in the District [**28] of New Jersey on July 18, 2002 -- well within the putative limitations period. Although that case was dismissed on April 10, 2003, the dismissal was not on the merits, but, rather, for want of personal jurisdiction over the named defendants (SNESL, Larkin, and Prentiss). Rodi, 255 F. Supp. 2d at 351.

This history is significant because, [illegible] under Massachusetts law, if an action is duly commenced within the limitations period and then dismissed for "any matter of form," the plaintiff is entitled to "commence a new action for the same cause within one year after the dismissal." Mass. Gen. Laws ch. 260, § 32. The savings statute applies, inter alia, to an action originally filed and dismissed in a court of another state or in a federal district court. See Boutiette v. Dickinson, 54 Mass. App. Ct. 817, 768 N.E.2d 562, 563-64 (Mass. App. Ct. 2002); Liberace v.

Conway, 31 Mass. App. Ct. 40, 574 N.E.2d 1010, 1012 (Mass. App. Ct. 1991).

We have no doubt that, for purposes of this savings statute, dismissals for want of personal jurisdiction are appropriately classified as dismissals arising out of matters of form. [**29] Cf. Ciampa v. Beverly Airport Comm'n, 38 Mass. App. Ct. 974, 650 N.E.2d 816, 817 (Mass. App. Ct. 1995) (holding that "dismissal for bringing an action in the wrong court is 'a matter of form' within the meaning of § 32"). After all, as the Supreme Judicial Court of Massachusetts wrote almost two centuries ago in describing an earlier version of the law, the legislature enacted the savings statute to ensure that "where [a] plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process," the statute of limitations "shall not prevent him from doing so." Coffin v. Cottle, 33 Mass. (16 Pick.) 383, 386, 1835 Mass. LEXIS 19 (1835) (emphasis supplied). A dismissal for lack of personal jurisdiction is the paradigmatic example of a decision not on the merits that can be cured by new process in a different court. See Teva Pharms., USA, Inc. v. United States FDA, 337 U.S. App. D.C. 204, 182 F.3d 1003, 1008 (D.C. Cir. 1999).

That ends this aspect of the matter. This action and the earlier New Jersey action are sisters under the skin; they involve the same parties, the same events, the same nucleus [**30] of operative facts, and the same causes of action. By means of the savings statute, the plaintiff had one year from the dismissal of his timely New Jersey action -- until April 10, 2004

-- to file anew. He instituted the action sub judice on June 9, 2003. His fraudulent misrepresentation claim is therefore timely.

In an effort to blunt the force of the savings statute, SNESL raises the red flag of waiver. It asserts that because the plaintiff first set forth the savings statute argument in his opposition to the defendants' motion to dismiss, he is not entitled to benefit from it. SNESL's flag-waving overlooks, however, that "a court asked to dismiss a complaint on statute of limitations grounds may examine not only the complaint but also such other documents as may appropriately be considered under Fed. R. Civ. P. 12(b)(6). See Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001).

Here, the facts that the plaintiff relies on to show the applicability of the savings statute (e.g., the date that he filed the original action, the nature of that action, the date it was dismissed, and the basis for [*19] the dismissal) are [**31] all susceptible to judicial notice. See Fed. R. Evid. 201. Those facts may, therefore, be considered in assessing the force of the limitations defense. See Colonial Mortg. Bankers, 324 F.3d at 15-16; see also Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir. 1990) ("It is well-accepted that federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand.").

SNESL's citation to Granahan v. Commonwealth, 19 Mass. App. Ct. 617, 476 N.E.2d 266 (Mass. App. Ct. 1985), does not alter this conclusion. "In a diversity case, procedure, unlike substance, is

governed by federal law. See Correia, 354 F.3d at 53 ("Federal courts sitting in diversity apply state substantive law and federal procedural rules."). Under federal procedural precedents, there has been no waiver: the plaintiff presented developed argumentation on the savings statute to the lower court, and thus preserved that issue for appellate review. n3 B & T Masonry Constr. Co. v. Pub. Serv. Mut. Ins. Co., 382 F.3d 36, 40 (1st Cir. 2004).

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n3 In all events, Granahan is materially distinguishable. Here, the plaintiff presented his savings statute argument to the nisi prius court. In contrast, Granahan formally raised his savings statute contention for the first time in the appellate court. In launching that effort, Granahan relied solely on appellate argumentation, not "pleadings, affidavits, or other documents presented to the motion judge." 476 N.E.2d at 268 n.5. The Appeals Court refused to entertain the argument. Id. at 268. So understood, Granahan represents nothing more than the Massachusetts equivalent of the federal courts' familiar raise-or-waive rule. See, e.g., Teamsters, Chauffeurs, Warehousemen & Helpers Union v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 1992) (warning that "legal theories not raised squarely in the lower court cannot be broached for the first time on appeal").

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[**32]

To say more on this issue would be supererogatory.

At this stage of the game, the statute of limitations affords no basis for dismissal of the plaintiff's fraudulent misrepresentation claim. n4

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n4 This holding depends, of course, on the plaintiff's allegation as to when he first learned of the persistent (and likely insuperable) deficiencies that precluded ABA accreditation. Should the proof on this point unfold differently, the district court is free to reexamine the date of accrual.

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C. The Chapter 93A Claim.

The situation concerning the plaintiff's claim under the Massachusetts Consumer Protection Act is less clear-cut. "\"Before bringing suit under that statute, a plaintiff must mail to the defendant a "written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon." Mass. Gen. Laws ch. 93A, § 9(3). This notification must be furnished no fewer than thirty days prior to the filing of suit. Id. The statutory [**33] notice requirement is not merely a procedural nicety, but, rather, "a prerequisite to suit." Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 333 N.E.2d 202, 204 (Mass. 1975). Furthermore, "as a special element" of the cause of action, it must be alleged in the plaintiff's complaint. Id.

In this instance, neither the plaintiff's complaint nor the documents attached thereto mention any such

notification. That is sufficient ground to justify dismissal of the Chapter 93A claim. See, e.g., City of Boston v. Aetna Life Ins. Co., 399 Mass. 569, 506 N.E.2d 106, 109 (Mass. 1987); Spilios v. Cohen, 38 Mass. App. Ct. 338, 647 N.E.2d 1218, 1220-21 (Mass. App. Ct. 1995); see also Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988) (explaining that, in order to survive a Rule 12(b)(6) motion, a complaint must "set forth factual allegations, either direct or inferential, respecting [*20] each material element necessary to sustain recovery under some actionable legal theory").

This ruling has no effect on the plaintiffs fraudulent misrepresentation claim. See York v. Sullivan, 369 Mass. 157, 338 N.E.2d 341, 346 (Mass. 1975) [**34] (explaining that "[t]he [notice] requirement is a prerequisite to an action under [Chapter 93A, § 9], but nothing in the statute makes it a prerequisite to any other remedy available to aggrieved consumers"). Moreover, it may represent no more than a temporary victory for the defendants. "A failure to allege compliance with the statutory notice requirement is not necessarily a death knell for a Chapter 93A claim. Massachusetts courts typically have allowed plaintiffs to amend in order to cure this kind of modest pleading defect. See, e.g., Jacobs v. Yamaha Motor Corp., 420 Mass. 323, 649 N.E.2d 758, 761 (Mass. 1995); Parker v. D'Avolio, 40 Mass. App. Ct. 394, 664 N.E.2d 858, 861 n.4 (Mass. App. Ct. 1996). Federal practice is no less permissive. See Fed. R. Civ. P. 15(a) (stating that leave to amend "shall be freely given when justice so requires").

Allowing an opportunity to amend is especially

fitting here. Our reasons are fivefold. First, the plaintiff filed the complaint pro se, and "courts [should] endeavor, within reasonable limits, to guard against the loss of pro se claims due to technical [**35] defects." Boivin, 225 F.3d at 43. Second, "a fraudulent misrepresentation, actionable at common law, often can form the basis for a Chapter 93A claim. See, e.g., Adams v. Liberty Mut. Ins. Co., 60 Mass. App. Ct. 55, 799 N.E.2d 130, 140 n.19 (Mass. App. Ct. 2003); Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 396 N.E.2d 149, 154 (Mass. App. Ct. 1979); see also VMark Software, 642 N.E.2d at 595 (collecting cases). So here: apart from the question of notice, the plaintiff's allegations of fraudulent misrepresentation state a colorable claim for relief under Chapter 93A. Third, the plaintiff vouchsafed in his opposition to the motion to dismiss, and now reaffirms, that he did in fact furnish the statutorily required notice. n5 Fourth, we do not know whether the district court even focused on this defect (as we have said, the district court did not state a particularized ground for dismissing this claim). Finally, the plaintiff, even without knowing the precise basis for the district court's order of dismissal, did seek leave to amend as part of his reconsideration request (an overture that the district [**36] court denied without any explanation).

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n5 The plaintiff actually submitted the putative notice to the district court, and it is in the record on appeal. We take no view of its sufficiency vis-a-vis the statutory requirement.

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The Supreme Court declared long ago that "the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). The view that the pleading of cases is a game in which every miscue should be fatal is antithetic to the spirit of the federal rules. Cf. Fed. R. Civ. P. 1 (explaining that the federal rules designed to achieve, inter alia, the "just" resolution of disputes). Each case is sui generis. Here, however, the circumstances cry out for affording the plaintiff a fair opportunity to replead his Chapter 93A claim. Accordingly, we direct the district court, on remand, to grant the plaintiff that opportunity.

III. CONCLUSION

We need go no further. For the reasons [**37] elaborated above, we reverse the district court's order insofar as it dismisses the fraudulent misrepresentation count. We affirm the order insofar as it dismisses the Chapter 93A count but direct that the plaintiff be afforded leave to amend that [*21] count. The portion of the order dismissing the other seven counts in the complaint has not been contested, and, accordingly, we leave that portion of the order intact.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Two-thirds costs shall be taxed in favor of the plaintiff.